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A limited liability partnership formed in the State of Delaware

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9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12

13 ROCÍO CORDOVA, *individually and on behalf*
of all others similarly situated,

14 Plaintiff,

15 vs.

16 GREYHOUND LINES, INC., and DOES 1-100,

17 Defendants.
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Case No. 4:19-cv-00442-PJH

**DEFENDANT GREYHOUND LINES,
INC.'S NOTICE OF MOTION AND
MOTION TO DISMISS PLAINTIFF'S
FIRST AMENDED COMPLAINT; AND**

**MEMORANDUM OF POINTS AND
AUTHORITIES**

Hearing Date: March 6, 2019
Hearing Time: 9:00 a.m.
Courtroom: 3
Judge: Hon. Phyllis J. Hamilton

Compl. Filed: November 8, 2018
Am. Compl. Filed: January 18, 2019
Notice of Removal Filed: January 25, 2019

[Filed Concurrently With Proposed Order
Granting Motion]

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 6, 2019, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 3 – 3rd Floor of the United States District Court for the Northern District of California, located at 1301 Clay Street, Oakland, CA 94612, Defendant Greyhound Lines, Inc. (“Greyhound”) will and hereby does move this Court for an order dismissing Plaintiff Rocío Cordova’s (“Plaintiff”) First Amended Complaint brought against Greyhound, and each purported claim set forth therein.

Greyhound makes this Motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that Plaintiff’s First Amended Complaint does not state a claim for which relief can be granted against Greyhound. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

Greyhound also makes this Motion pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure on the grounds that Plaintiff failed to join a party, the U.S. Customs and Border Protection, under Rule 19 of the Federal Rules of Civil Procedure. Grounds also include that Plaintiff has failed to plead the reasons for nonjoinder pursuant to Rule 19(c).

Further, Greyhound makes this Motion pursuant to Rule 23 of the Federal Rules of Civil Procedure on the grounds that there is no reasonable possibility that Plaintiff can establish an appropriate class, specifically: that (1) the class is sufficiently numerous; (2) there are questions of law or fact common to the class; (3) Plaintiff’s claims and defenses are typical to the class; (4) Plaintiff will fairly and adequately represent the class; and (5) the defendant has acted or refused to act in a manner common to the class. *See Fed. R. Civ. P. 23(a),(b)(2); Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 990 (N.D. Cal. 2009).

This motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the pleadings and records on file with the Court, and any such further evidence as may be presented at the time of the hearing on this Motion.

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DATED: February 7, 2019

REED SMITH LLP

By: /s/ Jesse L. Miller

Jesse L. Miller

Attorneys for Defendant

GREYHOUND LINES, INC.

REED SMITH LLP
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Greyhound Lines, Inc. (“Greyhound”) provides safe, reliable, and affordable intercity transportation without regard to race, ethnicity, immigration status, or other protected characteristic. Its business is subject to state and federal statutes and regulations, including 8 U.S.C. § 1357, a statute which grants immigration officials authority to search any vehicle within a reasonable distance of any United States external boundary. Regulations interpret “reasonable distance” as 100 air miles from an international border or a shoreline. 8 C.F.R. § 287.1.

The reach of the statute is broad. According to the ACLU, nearly two-thirds of the nation’s population lives within this zone—including the entire populations of Florida, New Jersey, and Massachusetts, which have no international border. Unable to obtain relief from Congress to narrow or do away with the authority granted by the federal statute, plaintiffs improperly ask this Court to effectuate a legislative change that only Congress can authorize.

To that end, Plaintiff Rocío Cordova alleges she was on a Greyhound bus that Customs and Border Protection (“CBP”) agents boarded within 100 miles of an international border. Once on board, she asserts, the agents questioned passengers, eventually pulling an individual off the bus for questioning. She also recounts reports of assertedly discriminatory behavior by CBP officers on Greyhound buses that she did not ride. In her view, allowing the CBP officers on board is invidious discrimination against her on the basis of her race and/or ethnicity, contradicting assertions Greyhound makes on its websites that it will not discriminate against its passengers.

Putting aside that Greyhound is not responsible for the CBP’s conduct, allowing officers on board is not a discriminatory policy, but a legal duty when a bus is within 100 miles of the border, as it was in Plaintiff’s case. The Supreme Court has limited application of 8 U.S.C. § 1357 in cases involving individual drivers but has never clarified its application to corporations like Greyhound. It is not an idle distinction; unlike an individual’s car, Greyhound buses are subject to warrantless searches by state and federal officials. Until the scope of Greyhound’s duty is clear, it must follow the law as it exists, and California’s laws cannot impose obligations inconsistent with those federal duties. Plaintiff’s attempt to push Greyhound into conflict with CBP must fail as unlawful.

Despite the conspicuous failure to mention that Plaintiff's bus was subject to 8 U.S.C. § 1357, or that she personally suffered discriminatory treatment by CBP, Plaintiff seeks to represent a class of *all* California citizens who *ever* purchased a Greyhound ticket. The overbroad class includes those with time-barred claims, those whose rides were uninterrupted by CBP, and those who, like Plaintiff, were never singled out for questioning or harmed by CBP. Nor could it be said that Plaintiff is an adequate class representative, or that her claims are typical of any well-defined class. Indeed, her failure to identify a personal experience of discriminatory treatment render her subject to unique defenses that will consume the litigation.

Plaintiff's overreaching reveals the game plan: disparage Greyhound with widely publicized and inflammatory accusations of racial discrimination and threaten it with costly class discovery to provoke a quick settlement. While Greyhound is already on record saying it does not support CBP's actions and will support legislative efforts to change 8 U.S.C. § 1357, Greyhound will not be intimidated by hard-nosed litigation tactics and has no interest in being forced into legal conflict with Plaintiff's true target: CBP, particularly when it has no stake in the constitutionality of that statute. CBP stands to lose authority from Plaintiff's proposed injunction, so it is an indispensable party that must be joined to defend its own interest. And Plaintiff's failure to name CBP as a party was telling and provides an independent basis for dismissal.

II. BACKGROUND

A. Greyhound's Business and Governing Regulations

For more than a century, Greyhound has provided intercity transportation services throughout North America. As a passenger carrier operating in interstate commerce, Greyhound is subject to the jurisdiction of the Federal Motor Carrier Safety Administration ("FMCSA"), an agency within the Department of Transportation. Among other things, the FMCSA regulates safety, drivers and their qualifications, and record-keeping standards, and it is authorized by statute and regulation to board and inspect subject vehicles in operation. *See* 49 U.S.C. § 31502; 49 C.F.R. 396.9.

Because Greyhound receives federal funds, it is subject to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* This is set forth on Greyhound's website with a required notice that it will not discriminate against its passengers on account of any protected characteristic. (*See*

1 Compl. ¶ 20).

2 **B. The INA Act of 1952**

3 In 1952, Congress passed the Immigration and Nationality Act (“INA”). One result of the
4 INA is 8 U.S.C. § 1357. That statute provides immigration officers the authority to, without a
5 warrant, board any vehicle within a reasonable distance of an external boundary of the United States
6 to search for aliens. 8 U.S.C. § 1357(a)(3). Regulations have defined “reasonable distance” to be
7 100 air miles, and “external boundary” to include land boundaries and shorelines. 8 C.F.R.
8 § 287.1(a)(1).

9 **C. Plaintiff’s Allegations**

10 Plaintiff asserts she rode a Greyhound bus between San Diego and Phoenix, presumably
11 along Interstate 8, which runs near the Mexican border. (*See* First Am. Compl. “FAC” ¶ 52). She
12 alleges that, while still in California, the bus stopped and between two and four immigration officials
13 boarded the bus and “worked from the front to the back of the bus.” (*Id.*). Plaintiff asserts that,
14 because she is Latina, she is “well aware” where the immigration checkpoints are along the route,
15 and that the inspection did not occur at one. (*Id.*).

16 In her initial complaint, Plaintiff recounted that a recipient of Deferred Action for Childhood
17 Arrivals (“DACA”), by definition an undocumented immigrant, was removed from the bus for
18 questioning before being returned. (Orig. Compl. ¶ 12). In her First Amended Complaint, Plaintiff
19 drops any reference to the individual’s DACA status, instead identifying her as a “young Latina
20 woman.” (FAC ¶ 57). The process is alleged to have taken around 20 to 30 minutes. (*Id.* at 58).
21 Plaintiff does not allege that she was approached or questioned by the immigration agents. (*Id.* 52-
22 59). Nor does she allege that the bus arrived in Phoenix later than expected. (*See id.*).

23 Plaintiff’s experience with CBP agents is different from the experiences of others alleged in
24 her First Amended Complaint. For example, she states that a Korean American woman was roused
25 for questioning on a Greyhound bus. (*See id.* ¶ 63). The bus in question was traveling between San
26 Diego and Los Angeles, almost certainly within 100 miles of the ocean. Next, a passenger in
27 Indio—within 100 air miles of both the ocean and Mexican border—was purportedly harassed by
28 CBP agents after he began to film them. (*Id.* ¶ 65). It is unstated whether anyone else filmed the

officers and how they were treated. (*See id.*). Next, CBP agents purportedly stopped a Latino passenger to investigate his immigration status as he tried to board a bus. (*Id.* at ¶ 66). It appears from the allegation that the officers were not on board the bus, and they purported to have some level of suspicion, contradicting Plaintiff’s allegation that Greyhound intentionally waits to entrap passengers aboard its buses for immigration inspections. (*See id.* ¶¶ 6, 66).

A 2016 YouTube video (viewable at <https://www.youtube.com/watch?v=z1eEq1GQiWE>) allegedly depicts CBP questioning passengers on board a Greyhound bus. (*Id.* ¶ 68). Though Plaintiff insists the video “depicts the harassment and humiliation that non-white passengers face,” the footage does not bear that out. Rather it shows the officers detaining the cameraman, whose ethnicity is neither evident nor alleged, after he refused to answer questions about his citizenship.

The final allegation notes that a Jamaican woman and a Trinidadian girl were detained or arrested following CBP questioning. (*Id.* ¶ 70). The Complaint does not specify whether: either was “non-white,” the questioning occurred on the roadside, at a station, or a checkpoint, the inspection was supported by a warrant, probable cause, or reasonable suspicion, or that the two individuals were singled out or that other passengers were not questioned. (*Id.*).

Plaintiff further asserts vague allegations that a Greyhound bus driver accosted an African American passenger, and that a Muslim group has claimed that a passenger was removed from a bus for speaking Arabic. (FAC ¶ 71). Neither incident is alleged to involve CBP inspections. (*See id.*).

III. LEGAL STANDARD

A motion to dismiss brought pursuant to Rule 12(b)(6) tests the legal sufficiency of the Complaint to determine whether there is a “lack of a cognizable legal theory,” or “the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t.*, 901 F.2d 696, 699 (9th Cir. 1988).

A complaint does not “suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). “Factual allegations must be enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp.*, 550 U.S. at 555. The Court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Ashcroft*, 556 U.S. at 678.

Moreover, where it is clear that amendment would be futile, the court may dismiss the complaint without leave to amend. *See Havas v. Thornton*, 609 F.2d 372 (9th Cir. 1979).

This Court is permitted to “take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment.” *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (internal citations omitted) *overruled on other grounds by Galbraith v. City of Santa Clara*, 207 F.3d 1119 (9th Cir. 2002). In reviewing a motion to dismiss, courts may also disregard any allegation made in Plaintiff’s complaint that is inconsistent with judicially noticeable documents. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (a court need not “accept as true allegations that contradict matters properly subject to judicial notice or by exhibit”).

IV. DISCUSSION

State law may not prescribe standards inconsistent with federal mandates. Thus Plaintiff may not force Greyhound to defy requests from CBP agents that federal law permits. Because Plaintiff bases each of her claims on the premise that Greyhound may not lawfully permit CBP agents on board, each claim must fail. What’s more, Greyhound should not be forced to defend CBP’s interest in this action. CBP should be joined, and the matter should be dismissed in CBP’s absence.

Plaintiff’s claims fail for reasons independent of 8 U.S.C. § 1357: she fails to establish that any purported wrongdoing caused her harm, and does not identify any policy that differentiates between passengers. Finally, Plaintiff’s allegations fail on their face to put forward an ascertainable class or a community of interest. Her class allegations should therefore be dismissed.

A. State Law Cannot Thwart Federal Mandates

1. Standards In Conflict With Federal Law Are Preempted

Our federal Constitution provides that the laws of the United States are the supreme law of the land, “any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2. “It is basic to this constitutional command that all conflicting state provisions be without effect.” *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). A state law is preempted if it does not permit compliance with federal law or if it obstructs the execution of federal objectives. *Roberts v. N. Am. Van Lines, Inc.*, 394 F. Supp. 2d 1174, 1178 (N.D. Cal. 2004) (dismissing CLRA claims against motor carrier as preempted).

Here, deeming Greyhound's accession to CBP demands to be unlawful would prevent it from complying with orders that 8 U.S.C. § 1357 permits, and would obstruct the use of federal authority Congress provided. To the extent the duty Plaintiff seeks to impose on Greyhound thwarts federal objectives, it is preempted. *See Roberts*, 394 F. Supp. 2d at 1178. While the United States Supreme Court has limited the statute's reach in as-applied challenges, as explained below, the Supreme Court's limited holdings do not clarify the statute's application to businesses like Greyhound.

Under federal law, a statute is presumed to be constitutional. *Heller v. Doe*, 509 U.S. 312, 320 (1993). The as-applied challenges discussed below do not amount to facial unconstitutionality, which requires a showing that a statute is void in *all* applications. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Thus, Section 1357's application to Greyhound is presumptively constitutional. Plaintiff's claims seek to impose a standard that thwart the statute's operation of that statute. Accordingly, her claims should be dismissed as preempted.

2. Section 1357 Has Never Been Held Unconstitutional

No court has declared 8 U.S.C. § 1357 to be facially unconstitutional. Nor has any court found 8 C.F.R. § 287.1 either unconstitutional or an unreasonable interpretation of the statute. Therefore, the CBP's interpretation should be accorded deference. *See Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 468 U.S. 1227 (1984) (holding that courts must defer to an agency's interpretation of a statute it implements). Over the years, however, several private motorists have successfully asserted as-applied challenges to the statute, resulting in Supreme Court cases limiting the statute's impact on them. But, as explained below, these decisions do not apply to Greyhound.

a. *Almeida-Sanchez* And Its Progeny

The first of these cases is *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). There, Border Patrol agents stopped the defendant's car on an east-west highway 25 miles from the border during a "roving patrol." *Id.* at 267. The agents searched the vehicle, found marijuana, and arrested the defendant. *Id.* at 269. The officers admitted that they had no reasonable suspicion to stop or search the vehicle, but claimed justification in 8 U.S.C. § 1357. *Id.* at 268. The Court disagreed. It reasoned that the statute did not permit the warrantless search of the defendant's car because he was not stopped at the border or its equivalent, where the Fourth Amendment permits warrantless

1 searches. *Id.* at 273. Critically, however, the Court distinguished cases permitting warrantless
2 searches of closely regulated businesses. *Id.* at 271. The Court observed that the “difference
3 between those cases and this one is that businessmen engaged in such federally licensed and
4 regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner
5 here was not engaged in any regulated or licensed business.” *Id.*

6 The Court did not resolve the open question of the statute’s application to regulated
7 businesses in its next relevant case, *United States v. Brignoni-Ponce*, 422 U.S. 873, 876 (1975).
8 Rather, according to the Court, “[t]he only issue presented for decision [was] whether a roving patrol
9 may stop a vehicle in an area near the border and question its occupants when the only ground for
10 suspicion is that the occupants appear to be of Mexican ancestry.” *Id.* at 876. It ruled immigration
11 authorities could not stop defendants on that basis, except perhaps at the border or its functional
12 equivalent. *Id.* at 884. Justice Rehnquist wrote a separate concurrence to note the decision was “by
13 its terms and by its reasoning concerned only with the type of stop involved in this case.” *Id.* at 886.

14 The Court issued *United States v. Ortiz*, 422 U.S. 891 (1975), on the same day as *Brignoni-*
15 *Ponce*. Unlike the prior two cases, the defendant in *Ortiz* was stopped at a fixed checkpoint, not by a
16 roving patrol. *Id.* at 891–92. Border Patrol agents searched his vehicle and discovered three aliens
17 in the trunk. *Id.* at 892. The agents justified their search by pointing out facts that distinguished
18 *Almeida-Sanchez*. First, they noted that their discretion was limited by the location of the fixed
19 checkpoint. *Id.* at 894. Second, the agents argued that a checkpoint stop was less intrusive than
20 being stopped by a roving patrol. *Id.* The Court agreed that these distinctions were relevant to the
21 propriety of the *stop*, effectively validating § 1357 in those circumstances. *Id.* at 895. It disagreed,
22 however, that they sufficiently justified a more intrusive *search*. *Id.* Again writing a separate
23 concurrence, Justice Rehnquist stressed that “the Court’s opinion is confined to full searches, and
24 does not extend to fixed-checkpoint stops for the purpose of inquiring about citizenship.” *Id.* at 898.

25 The Court upheld the constitutionality of warrantless immigration stops at checkpoints in
26 *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). Balancing the government’s interest against
27 a motorist’s right to privacy, the Court found the need to make checkpoint stops was great, while the
28 intrusion occasioned by the stop—and diversion of some motorists for further questioning—was

1 minimal. *Id.* at 557–58. Thus, “even if it be assumed that such referrals are made largely on the
2 basis of apparent Mexican ancestry, we perceive no constitutional violation.” *Id.* at 563; *see United*
3 *States v. Ruiz-Perez*, No. CR-11-561-TUC-JGZ (DTF), 2012 WL 1078887, at *5 (D. Ariz. Mar. 30,
4 2012) (noting discretion of officers to refer motorists for questioning based on apparent ancestry).

5 The Ninth Circuit has found that the reasoning of *Martinez-Fuerte* applies with equal force to
6 temporary checkpoints. *United States v. Hernandez*, 739 F.2d 484 (9th Cir. 1984).

7 b. Additional Authority

8 As Justice Rehnquist insisted, the questions *Almeida-Sanchez* and its progeny resolved were
9 narrow ones. They did not answer whether § 1357 permits warrantless stops of a Greyhound bus for
10 the purpose of questioning its passengers. Subsequent decisions suggest an affirmative answer.

11 As noted, Greyhound buses may be stopped, boarded, and inspected by federal agents at any
12 time without a warrant including for other-than immigration purposes. *See* 49 U.S.C. § 31502; 49
13 C.F.R. 396.9. Courts around the country have found other industries subject to FMCSA regulation
14 to be “pervasively regulated” such that warrantless searches may be justified. *See United States v.*
15 *Castelo*, 415 F.3d 407, 410 (5th Cir. 2005) (finding commercial trucking to be “pervasively
16 regulated industry”); *United States v. Dominguez-Prieto*, 923 F.2d 464, 468 (6th Cir. 1991) (on basis
17 of FMCSA regulations, finding common carriers in trucking industry to be pervasively regulated).

18 Further complicating the matter, the Eighth Circuit has founded that CBP agents who
19 boarded a Greyhound bus at a station in Ogallala, Nebraska—more than 500 miles from any
20 border—acted consistently with the Constitution. *United States v. Angulo-Guerrero*, 328 F.3d 449
21 (8th Cir. 2003). In a concurring opinion, one judge explained that CBP had effectively decided to
22 make the bus station a temporary checkpoint, and the resulting intrusion was minimal. *Id.* at 453.
23 Under this authority, Plaintiff’s allegation that CBP works out of Greyhound terminals *weakens* her
24 case.

25 These authorities place Greyhound in a considerably different position than private motorists.
26 The history of regulation and warrantless inspection diminishes Greyhound’s expectation of privacy
27 and that of its riders, and the intrusion occasioned by stops at stations for questioning has been
28 deemed minimal. Thus, § 1357 likely has broader application to Greyhound than to private

motorists, and neither *Almeida-Sanchez* nor its progeny define this outer limit.

Fourth Amendment interests of passengers is a question distinct from Greyhound's interest—though bus passengers, too, have a diminished expectation of privacy as compared to private cars. *See United States v. Wise*, 877 F.3d 209, 218 (5th Cir. 2018). Once CBP accesses a bus—whether by consent or by operation of law—passengers retain their right to refuse questioning by agents or to leave the bus. *See, e.g., United States v. Drayton*, 536 U.S. 194, 203–04 (2002). The Supreme Court has rejected the argument that passengers cannot exercise their rights simply because the encounter occurs on the “cramped confines” of a bus. *Id.* at 204. (“Indeed, because many fellow passengers are present to witness officers’ conduct, a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus than in other circumstances.”).

These authorities thus provide Greyhound substantial reason to believe the holdings of *Almeida-Sanchez* are inapplicable to it. Given the presumption of constitutionality, Greyhound must presume that CBP's requests to board its buses are valid.

B. The First Amended Complaint Should be Dismissed Because Plaintiff Failed To Join A Necessary Party, or CBP Should Be Joined In This Suit To Protect Its Enforcement Authority

Greyhound intends to go no further than to establish that there is an open question whether 8 U.S.C. § 1357 is constitutional as applied to Greyhound, and that the law is presumed constitutional absent a clear showing to the contrary. Greyhound has no interest in defending the statute's ultimate constitutionality—it is on the record calling for the law to be changed.¹ And it is CBP,² not Greyhound, that stands to lose statutorily conferred authority as a result of the injunction Plaintiff seeks. As such, the Complaint must be dismissed, or CBP should be joined in this action to protect its interests. *See* Fed. R. Civ. P. 12(b)(7) & 19.

The Complaint fails due to Plaintiff's failure to join CBP as a necessary party. Pursuant to

¹ *See* https://www.washingtonpost.com/local/public-safety/lawsuit-targets-greyhound-over-warrantless-immigration-stops-aboard-buses/2018/11/08/1ed612a0-e362-11e8-ab2c-b31dcd53ca6b_story.html?utm_term=.be4f9f004f46. This runs contrary to Plaintiff's assertion that “Greyhound has refused to object and make clear to CBP that it does not authorize” immigration inspections aboard its buses. (*See* FAC ¶ 17).

² Here, references to CBP include its Commissioner, Kevin McAleenan, and/or any other responsible persons.

1 Rule 19 of the Federal Rules of Civil Procedure, a party must be joined to the action if the court
2 cannot afford complete relief in their absence and the person claims an interest relating to the subject
3 of the action, and the person's absence impedes the person's ability to protect the interest or
4 otherwise leaves an existing party subject to inconsistent obligations. *See* Fed. R. Civ. P. 19. If the
5 person "cannot be joined," then the case may be dismissed if the missing party is indispensable to
6 the action. *Id.* 19(b). The plaintiff must plead the reasons for failing to join a necessary party. *Id.*
7 19(c). Here, CBP falls squarely within that definition and Plaintiff was required to either name the
8 agency or explain why she could not do so. *See* Fed. R. Civ. P. 19(c). Consequently, dismissal is
9 required under Rule 19 because Plaintiff did not plead any reason for this non-joinder.

10 If CBP is not joined, Plaintiff will be unable to obtain complete relief. Even if this Court
11 deems CBP's application of 8 U.S.C. § 1357 to Greyhound unconstitutional, the ruling will have no
12 preclusive effect on CBP as a non-party. Moreover, assuming Plaintiff can obtain an injunction
13 forcing Greyhound to withhold consent to CBP searches, the injunction would be a dead letter to
14 CBP agents who believe Greyhound's consent is not necessary. The class members would thus
15 remain subject to the same conduct at the hands of CBP agents and could not obtain complete relief.

16 CBP also has an interest in this litigation. Plaintiff's requested injunction frustrates the
17 exercise of enforcement authority under § 1357 that has never been ruled unconstitutional. CBP is
18 unable to protect this interest unless it is joined. Again, Plaintiff must demonstrate that 8 U.S.C.
19 § 1357 is unconstitutional to avoid preemption, and Greyhound has no interest in defending the
20 statute. Without CBP's joinder, the Court will be deprived of the benefit of a truly adversarial
21 proceeding, and CBP may well find its wings clipped as a result.

22 Finally, resolution of this controversy without CBP's joinder would subject Greyhound to
23 conflicting obligations. For example, Plaintiff seeks an injunction forbidding Greyhound from
24 allowing CBP officers aboard its buses, yet Greyhound would still be subject to demands by CBP
25 agents pursuant to 8 U.S.C. § 1357 because the agency would not be bound by the Court's
26 injunction. Greyhound would therefore be in an untenable position: violate the Court's injunction or
27 risk liability for obstructing CBP inspections.

28 In fairness, if the Complaint is not dismissed, CBP should be joined. Plaintiff should name

her true adversary in this battle in which Greyhound has no stake. It is inequitable to force Greyhound to choose between defending CBP’s interest or precipitating its own battle with CBP due to Plaintiff’s requested injunction.

C. Plaintiff Does Not Identify a Discriminatory Policy Attributable To Greyhound

At root, the Greyhound policy Plaintiff complains of is its cooperation with presumptively lawful orders by federal agents wishing to board the bus to carry out an immigration inspection. It is apparent from the pleadings that this policy is common to *all* passengers regardless of the perceived or actual identities of those on board. Indeed, Plaintiff asserts that the officers worked from front to back, effectively preventing *anyone* from exiting the bus without passing them.

Plaintiff’s primary issue is the conduct of the CBP officers after boarding the bus, which she perceives as discrimination against individuals she perceives as “non-white.” Greyhound, however, has no control over the CBP officers, nor is it responsible for their actions. *See Davidson v. City of Westminster*, 32 Cal. 3d 197, 203 (1982) (“As a general rule, one owes no duty to control the conduct of another . . .”). This conclusion is not altered by the letter from 23 members of Congress who expressed the view that 8 U.S.C. § 1357 does not authorize CBP’s actions. For one thing, these members do not claim to be percipient witnesses to any immigration inspection aboard Greyhound buses. Further, these members of Congress are vested with the constitutional authority to amend or repeal the statute, but they have not done so.³ The power to interpret the laws, by contrast, is vested exclusively in the courts.

Similarly, Greyhound is not made responsible for CBP actions simply because CBP may have previously engaged in activity perceived as discrimination. Just as a statute is presumed to be constitutional, the law does not presume public officials will discharge their duties in an unconstitutional manner. The opposite is true. *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) (“[W]e note that a presumption of regularity attaches to the actions of Government agencies . . .”); *Kohli v. Gonzales*, 473 F.3d 1061, 1068 (9th Cir. 2007); Cal. Evid. Code § 664 (“It is presumed that official duty has been regularly performed.”); *see also Gegenheimer v. Stevenson*, No. 1-16-cv-1270-

³ Rep. Joaquin Castro has cosponsored a bill that largely forbids immigration enforcement in “sensitive location” [Protecting Sensitive Locations Act, H.R. 1815, 115th Cong. (2017)], but notably, the bill does not restrict enforcement aboard Greyhound buses.

RP, 2017 WL 2880867, at *2 (W.D. Tex. July 5, 2017) (refusing to assume that state agency would engage in racial discrimination against plaintiff). Plaintiff asks this Court to flip that presumption on its head to presume that CBP agents will *necessarily* engage in impermissible discrimination.

Nor do Plaintiff's allegations that Greyhound is a common carrier change this conclusion. Nothing in sections 2100–04 of the California Civil Code impose a duty on Greyhound to prevent passengers' exposure to law enforcement activity. Nor could it; to the extent these common carrier duties conflict with federal law, courts have found them preempted. *E.g., Mercer v. Sw. Airlines*, No. 13-cv-05057-MEJ, 2014 WL 4681788, at *5 (N.D. Cal. Sept. 19, 2015) (dismissing without leave to amend claim that airline removed passenger for discriminatory reasons in violation of Civ. Code § 2103). Instead, the statutes detail the services Greyhound must provide its passengers and the duty of care it owes with respect to safety. *See* Cal. Civ. Code §§ 2100–04.

Even if Plaintiff could establish that the officers considered a passenger's apparent ethnicity in approaching him or her for questioning, the Supreme Court has found that officers may lawfully do so. *Martinez-Fuerte*, 428 U.S. at 563. Although the Ninth Circuit has held ethnic appearance generally is not an appropriate consideration to justify a vehicle *stop*, the court distinguished where an initial stop is lawful and no particularized suspicion was needed to justify further inquiry. *United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.16 (9th Cir. 2000). Having boarded Greyhound buses pursuant to 8 U.S.C. § 1357, CBP officers need no particularized suspicion to question passengers, ask for identification, or request consent to search luggage. *Drayton*, 536 U.S. at 201.

This should be clear: Greyhound does not condone racial profiling or any form of invidious discrimination, nor does it endorse case law enabling it. The point here is simply that Plaintiff wishes to hold Greyhound accountable for the actions of federal agents against whom no claim would lie. But neither Greyhound nor the courts may “forbid law enforcement practices simply because [they] consider[] them distasteful.” *Florida v. Bostick*, 501 U.S. 429, 439 (1991) (reversing determination that law enforcement questioning aboard a crowded bus *per se* constitutes a seizure). Plaintiff's claims seek to use the common carrier laws to thwart federal authority conferred by 8 U.S.C. § 1357, and her claims must therefore fall.

The sole policy for which Greyhound may be held responsible is its compliance with state

and federal laws, including compliance with the presumptively lawful orders of public officers. All passengers—regardless of race, ethnicity, or immigration status—enjoy the benefits of Greyhound’s compliance as well as the burdens that compliance may entail. Because each of Plaintiff’s claims are based not on this policy, but on the alleged actions of CBP agents, each claim must fail.

D. Plaintiff Alleges No Reliance on Purportedly Misleading Advertising

Plaintiff premises her CLRA claim and the “fraudulent” prong of her UCL claim on the allegation that Greyhound’s permitting Border Patrol agents on board is inconsistent with the Title VI disclosure on Greyhound’s website. In her initial complaint, Plaintiff included no allegations that she ever saw Greyhound’s disclosure. After Greyhound demurred for failure to identify exposure to the advertisement, Plaintiff clarified in her amended complaint that she saw the advertisement before “buying” her ticket, but also clarified that her sister was the one who purchased her ticket. (FAC ¶ 53).

Even with this clarification, Plaintiff pleads no facts showing that she relied on the statement. *See Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 794 (9th Cir. 2012) (“As with the UCL, consumers seeking to recover damages under the CLRA based on a fraud theory must prove ‘actual reliance on the misrepresentation and harm.’”) (quoting *Nelson v. Pearson Ford Co.*, 186 Cal. App. 4th 983 (2010)). In fact, Plaintiff’s FAC is utterly devoid of any mention of reliance, and it is not even clear from the pleadings that Plaintiff saw the disclosure before her *sister* purchased the tickets.

Even if Plaintiff could show reliance, this reliance would not have been reasonable. Plaintiff states that, because she is Latina, she is fully aware of the location of immigration checkpoints along her route. (Compl. ¶ 54). If that is true, Plaintiff was then aware that CBP operated a fixed immigration checkpoint along the route she traveled.⁴ Plaintiff thus cannot contend that the Title VI disclosure led her to believe that she would be free from any CBP enforcement activity, since she should have expected to interact with CBP, at the very least, at the fixed immigration checkpoint.

Because Plaintiff did not rely on Title VI disclosure, she cannot show that any injury she may

⁴ CBP operates a checkpoint along Interstate 8 in eastern San Diego County. Because this is a fact that is generally known in this jurisdiction and can be accurately and readily determined from a source whose accuracy is not subject to reasonable dispute (here, the CBP’s own website), the Court may take judicial notice of this fact. Fed. R. Evid. 201(b). *See* <https://www.cbp.gov/border-security/along-us-borders/border-patrol-sectors/san-diego-sector-california/campo-station>

1 have suffered stemmed from the purported violation. *See Hansen v. Newegg.com Ams., Inc.*, 25 Cal.
2 App. 5th 714, 724 (2018). Lacking reliance and resulting damages, Plaintiff's statutory claims fail.
3 *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 641 (2009).

4 For similar reasons, Plaintiff's suggestion that Greyhound "concealed" that it is subject to
5 Border Patrol immigration checks and should have disclosed that fact is without merit. The law
6 imposes a duty of disclosure in limited circumstances, when the defendant: (1) is in a fiduciary
7 relationship with plaintiff; (2) has exclusive knowledge of material facts unknown to the plaintiff;
8 (3) actively conceals a material fact from the plaintiff; or (4) makes a partial representation but
9 conceals material facts. *Rubenstein v. The Gap, Inc.*, 14 Cal. App. 5th 870, 877 (2017).

10 Plaintiff's pleadings establish none of these. Plaintiff suggests that Greyhound's status as a
11 common carrier imposes a duty of disclosure. However, the law imposes that obligation on
12 *fiduciaries*, and it is well established Greyhound is not a fiduciary merely because it is a common
13 carrier. *Rookard v. Mexicoach*, 680 F.2d 1257, 1260 (9th Cir. 1982) (common carrier not a fiduciary
14 under California law). Plaintiff does not allege facts demonstrating active concealment, and nowhere
15 does the Complaint establish that Greyhound had exclusive knowledge that it is subject to
16 immigration inspections. On the contrary, 8 U.S.C. § 1357 and 8 C.F.R. § 287.1 are available to
17 anyone, and decades of publicly available case law illustrates that CBP targets Greyhound buses.
18 *See, e.g., Angulo-Guerrero*, 328 F.3d at 453; *United States v. Alvarez-Sanchez*, 774 F.2d 1036, 1038;
19 *United States v. Moya-Matute*, 735 F. Supp. 2d 1306, 1319 (D.N.M. 2008). In fact, the possibility of
20 an immigration inspection is not only foreseeable, but to be expected when traveling on a route with
21 a fixed immigration checkpoint, as Plaintiff did, diminishing her expectation of privacy.

22 Finally, as explained, Plaintiff's pleadings fail to establish that anything in Greyhound's Title
23 VI statement is untrue in light of CBP enforcement, since CBP obtains access to all passengers
24 aboard buses, regardless of the passengers' backgrounds. Her fraud-based claims under the UCL
25 and CLRA must therefore fail.

26 **E. Plaintiff Does Not Show Any Conduct Motivated By Her Protected Status**

27 A claim under the Unruh Civil Rights Act [Civ. Code § 51] requires Plaintiff to show:
28 (1) Greyhound discriminated against her; (2) her protected characteristic was a substantial

1 motivating reason for the discrimination; (3) Plaintiff suffered harm; and (4) Greyhound's conduct
 2 was a substantial factor in causing that harm. Judicial Council Of California Civil Jury Instruction,
 3 CACI No. 3060 (2011).

4 As stated above, Plaintiff has not established that she suffered discrimination. Greyhound
 5 complies with lawful orders from law enforcement without regard to the identities of its passengers
 6 on any given route, and it is evident in the pleadings that *all* passengers aboard Plaintiff's bus were
 7 subject to immigration inspection and *all* passengers arrived in Phoenix at the same time, regardless
 8 of their ethnicity. Further, Plaintiff does not allege that she was questioned, singled out, or racially
 9 profiled by the agents. This is fatal to her claim; one who complains of discrimination in the
 10 abstract, but who has not herself suffered unequal treatment, has no statutory standing under the
 11 Unruh Act. *Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 175 (2007) (affirming that Unruh
 12 Act plaintiff "cannot sue for discrimination in the abstract, but must actually suffer the
 13 discriminatory conduct"); *Surrey v. TrueBeginnings, LLC*, 168 Cal. App. 4th 414, 419 (2008) (no
 14 standing to challenge policy of charging men more than women where men did not pay inflated
 15 price).

16 Independently, Plaintiff does not even attempt to plead that her protected characteristic was a
 17 substantial motivating factor for the discrimination. Indeed, her sole allegation on the point states
 18 that "Defendants . . . continue to violate the Unruh Act by denying, aiding in the denial of, and/or
 19 inciting a denial of Greyhound passengers of the full and equal accommodations" in its business
 20 establishments. (FAC ¶¶ 121–22). This vague allegation about the denial of accommodations to
 21 other passengers does nothing to establish that *her* protected characteristic motivated *this* alleged
 22 discrimination. *See Angelucci*, 41 Cal. 4th at 175.

23 Finally, even assuming a half-hour delay were sufficient harm, the Complaint does not allege
 24 Greyhound's conduct was a substantial factor in causing the delay. Rather, as is apparent, the CBP
 25 agents determined that an undocumented immigrant was aboard and delayed the bus while they
 26 questioned him or her. Their authority to do so is clear. *See United States v. Outlaw*, 134 F. Supp.
 27 2d 807, 817 (W.D. Tex. 2001) (holding that police may lawfully delay passengers on a bus to
 28 investigate a crime they discover).

F. Plaintiff Pleads Insufficient Facts to Show Unfair Or Unlawful Conduct

As an initial matter, Greyhound notes that 8 U.S.C. § 1357 is fatal to Plaintiff's claims under California law independently of federal preemption. As the California Supreme Court has held "Courts may not simply impose their own notions of the day as to what is fair or unfair. . . . If the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, courts may not override that determination." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 182 (1999). Because the law permits CBP's actions, they provide no basis for Plaintiff's UCL claim.

Returning to Plaintiff's allegations, the fraudulent prong of Plaintiff's UCL claim fails for the reasons stated above. However, she also fails to plead sufficient facts to support her unfair and unlawful prongs.

1. Plaintiff Fails To Plead Facts Sufficient To Demonstrate Predicate Violations

Plaintiff presents a laundry list of statutes that Greyhound purportedly violated, but she pleads no facts to substantiate any such violation, much less her allegation that she has suffered pecuniary harm as a result.

- **False Advertising Law, Cal. Bus. & Prof. Code § 17500.** Plaintiff contends that Greyhound falsely advertises that it does not discriminate against its passengers. (FAC ¶ 90(a)). As stated above, Greyhound's policies are common to all passengers. Further, Plaintiff fails to allege reliance. *See Beyer v. Symantec Corp.*, 333 F. Supp. 3d 966, 980 (N.D. Cal. 2018).
- **Consumers Legal Remedies Act, Cal. Civ. Code § 1750; Unruh Civil Rights Act, Cal. Civ. Code § 51.** Greyhound explains above why these claims fail.
- **Cal. Civ. Code § 2100.** Plaintiff asserts that Greyhound violated this statute by failing to do everything necessary to protect Plaintiff from harm. (FAC ¶ 90(d)). The statute requires common carriers to ensure adequate safety. Plaintiff alleges no facts to show her bus was unsafe.
- **Cal. Civ. Code § 2103.** Plaintiff asserts that Greyhound failed to ensure passengers are treated with respect and civility, and by failing to respond to complaints of discrimination. (FAC ¶ 90(e)). She fails to allege that she was treated disrespectfully or uncivilly or that she ever made a complaint of discrimination.

- 1 • **Cal. Civ. Code § 2104.** Plaintiff asserts that Greyhound violated this statute
2 by deviating from regular bus routes and stopping in order to allow
3 immigration inspections. (FAC ¶ 90(f)). Plaintiff pleads no facts to show that
4 the bus deviated from its course, nor does Plaintiff allege that there was any
5 unreasonable delay, particularly as she does not allege she arrive in Phoenix
6 late.
- 7 • **Cal. Civ. Code §§ 1572, 1573.** Plaintiff alleges that Greyhound violated
8 various fraud statutes. However, she does not allege reliance or causation, as
9 required. *See Sateriale*, 697 F.3d at 794 (holding that UCL claims sounding
10 in fraud require allegations of actual reliance).
- 11 • **Cal. Civ. Code § 43.** The statute provides that every person has the right,
12 *subject to the qualifications and restrictions provided by law*, to be free from
13 bodily restraint or harm, personal insult, defamation, and injury to personal
14 relations. Plaintiff alleges Greyhound violated this statute by failing to
15 prevent passengers from being insulted or harmed. (FAC ¶ 90(i)). Plaintiff
16 does not allege that she was insulted or harmed. Moreover, the statute cannot
17 restrain speech simply because one might find it insulting. *Texas v. Johnson*,
18 491 U.S. 397, 414 (1989).

19 Because Plaintiff offers no factual basis for these violations, she cannot use them as a basis
20 for her UCL claim. *Hobby Indus. Ass'n of Am., Inc. v. Younger*, 101 Cal. App. 3d 358, 372 (1980)
21 (holding that a defense to an underlying violation is a defense to a UCL claim).

22 2. Plaintiff Does Not Establish Unfairness

23 Additionally, these facts collectively establish no “unfairness” under the UCL. For a
24 business practice to be unfair, (1) the consumer injury must be substantial; (2) the injury must not be
25 outweighed by any countervailing benefits; and (3) it must be an injury that consumers could not
26 reasonably have avoided. *Camacho v. Automobile Club of S. California*, 142 Cal. App. 4th 1394,
27 1403 (2006).

28 Plaintiff identifies no substantial injury. Rather she suggests that she may have paid “less” or
would not have purchased a Greyhound ticket if she knew she was aware that the bus was subject to
CBP inspections. (FAC ¶ 6). Notably, however, this injury is belied by her statement that she is
“well aware” of the location of CBP inspection checkpoints, thus demonstrating her knowledge that
the schedule she rode was, in fact, subject to an immigration inspection. (*See id.* ¶ 54).

Moreover, business conduct is not unfair if done for a legitimate business reason. *See, e.g.,*
Motors, Inc. v. Times Mirror Co., 102 Cal. App. 3d 735, 740 (1980). Here, Greyhound merely
complies with federal law when it accedes to CBP demands pursuant to 8 U.S.C. § 1357, providing a

legitimate business reason and countervailing interest outweighing Plaintiff's purported injury.

Moreover, Plaintiff fails to establish that she could not have avoided the purported injury. Plaintiff asserts that Greyhound is the only company targeted by CBP raids, which indicates that she had alternative bus providers with a lower likelihood of CBP interaction. *See Shadoan v. World Sav. & Loan Ass'n*, 219 Cal. App. 3d 97, 103, 106 (1990) (no unfairness under UCL when products without disputed penalty were available). Plaintiff likewise could have chosen other means of travel, for example, by train, airplane, private car or another bus company. *See id.* Or, indeed, Plaintiff could have remained in San Diego. *See Olsen v. Breeze, Inc.*, 48 Cal. App. 4th 608, 628–29 (1996).

Plaintiff therefore fails to demonstrate that Greyhound's purported practices are "unfair" within the meaning of the UCL. Her claim should be dismissed.

G. There Is No Reasonable Possibility That Plaintiff Will Establish A Class

As the above discussion illustrates, the legal issues that render Plaintiff's claims insufficient will present individualized issues that will consume the litigation—particularly given the overbroad class definition. "Where the complaint demonstrates that a class action cannot be maintained on the facts alleged, a defendant may move to strike class allegations prior to discovery." *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 990 (N.D. Cal. 2009). "Before a motion to strike is granted, the court must be convinced that any questions of law are clear and not in dispute, and that under no set of circumstances could the claim or defense succeed." *Id.*

In order to certify an injunctive-relief class, Plaintiff must establish that (1) the class is sufficiently numerous; (2) there are questions of law or fact common to the class; (3) Plaintiff's claims and defenses are typical to the class; (4) Plaintiff will fairly and adequately represent the class; and (5) the defendant has acted or refused to act in a manner common to the class. Fed. R. Civ. P. 23(a),(b)(2).

Here, there is no reasonable possibility that Plaintiff can establish an appropriate class.

1. Plaintiff Cannot Establish Commonality

Plaintiff's proposed class encompasses "all California consumers who, since January 20, 2017, have purchased a Greyhound bus ticket for travel to, from, or within California, including a subclass of Latino and non-white California consumers who, since January 20, 2017, have purchased

1 a Greyhound bus ticket.” (FAC ¶ 79). Given the enormity of the proposed class, Plaintiff cannot
2 demonstrate commonality sufficient to maintain a class.

3 Commonality requires the Plaintiff to show that there are questions of law or fact common to
4 the class. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011). As the Supreme Court has
5 explained, this requires that the class have suffered the same injury. *Id.*

6 Here, Plaintiff’s class includes *all* California consumers who purchased a Greyhound bus
7 ticket since January 20, 2017.⁵ These individuals cannot have shared the same injury. Plaintiff does
8 not allege that CBP boards every Greyhound bus between each stop, nor does she even go so far as
9 to show that *most* Greyhound passengers encounter CBP agents. Rather, Plaintiff suggests that
10 there’s a policy of allowing CBP agents aboard its buses. This recalls *Dukes*, in which Wal-Mart’s
11 alleged policy of allowing local managers to make personnel determinations allegedly enabled a
12 culture in which these managers engaged in sex discrimination. *Id.* at 355. Here, the alleged policy
13 of allowing CBP aboard, even if one existed, would at most enable the circumstances in which
14 individual CBP agents somehow behave poorly in the limited instances in which they demand to
15 board a bus.

16 This is not enough to show commonality, as it would not “resolve an issue that is central to
17 the validity of each one of the claims in one stroke.” *Id.* at 355. For example, it would remain for
18 the Court to determine whether CBP boarded each class member’s bus, and whether CBP engaged in
19 discriminatory treatment of passengers. *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 159 n. 15
20 (1982) (holding that commonality could have been established by showing common policy that
21 *manifested* in the same general manner). Even if CBP boarded each bus, establishing that a CBP
22 agent acted in a discriminatory fashion in one instance does not demonstrate that CBP behaved
23 inappropriately in another instance. *See Dukes*, 564 U.S. at 355–56. Plaintiff’s commonality
24 argument hangs on the sole assumption that CBP agents *necessarily* discriminate against
25 passengers—an assumption the law does not permit. *See U.S. Postal Serv.*, 534 U.S. at 10.

26 This is to say nothing of those passengers who purchased tickets but did not ride the bus, like

27 ⁵ It is no coincidence that Plaintiff begins the class period on the day of the last presidential
28 inauguration. Rather, it underscores that this is a fight between Plaintiff and the federal
government—not Greyhound.

Plaintiff's sister, those who were exposed to no purportedly misleading advertisements, or those who purchased tickets and were lawfully approached by a CBP agent in the public areas of a Greyhound terminal. *See Patel v. City of Montclair*, 798 F.3d 895, 900 (9th Cir. 2015) (holding there is no privacy interest in the portions of a private business that are open to the public).

2. Plaintiff Cannot Establish Typicality

In the Ninth Circuit, “[t]he test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.” *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (citing *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)). Class treatment is inappropriate if “there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to [her].” *Hanon*, 976 F.2d at 508.

As just discussed, the class does not share a common injury, and Plaintiff bases her action on conduct which, if not unique to her, is shared by only a small subset of her class. Further, there is substantial danger that Plaintiff will be preoccupied by defenses unique to her. For example, she cannot dispute that she traveled within 100 miles of an international border on her trip to Phoenix. As illustrated by the extensive discussion of 8 U.S.C. § 1357 here, the applicability of a preemption defense will be a central component of this litigation, which may not be necessary for those passengers who rode buses outside of the 100 mile radius. Further, Plaintiff pleads no reliance, and no exposure to discriminatory conduct. These are central to her claims, and thus will preoccupy the Plaintiff at the expense of absent class members to whom these defenses may be inapplicable.

3. Plaintiff Cannot Establish That She Is An Adequate Representative

Finally, Plaintiff's allegations reveal a similarly insurmountable hurdle to establishing her adequacy as a class representative. A class representative is not adequate if she fails to seek all available remedies on behalf of the proposed class. *Drimmer v. WD-40 Co.*, No. 06-CV-900 W (AJB), 2007 WL 2456003, at *3 (S.D. Cal. Aug. 24, 2007); *Tasion Commc'ns, Inc. v. Ubiquiti Networks, Inc.*, 308 F.R.D. 630, 642 (N.D. Cal. 2015) (quoting *Drimmer*, 2007 WL 2456003); *Turcios v. Carma Labs., Inc.*, 296 F.R.D. 638 (C.D. Cal. 2014)

1 Here, the only monetary relief Plaintiff seeks is for her attorneys. Although she leaves
2 damages in issue by reserving her right to seek them at any time, she states that she does not yet seek
3 them. Unless and until she clarifies her allegations, she is not an adequate representative for the
4 class.

5 Because the face of Plaintiff's First Amended Complaint demonstrate that she cannot
6 establish commonality, typicality, or adequacy, the Court should strike the class allegations from this
7 action. *See Sanders*, 672 F. Supp. 2d at 990.

8 **V. CONCLUSION**

9 For the foregoing reasons, Greyhound respectfully requests that the Court dismiss each of
10 Plaintiff's claims with prejudice. Should the Court find dismissal with prejudice unwarranted,
11 Greyhound requests that the Court compel the joinder of CBP to protect its own interest in this
12 litigation and to prevent exposing Greyhound to inconsistent obligations. Finally, Greyhound
13 respectfully requests that the Court strike Plaintiff's class allegations.

14 DATED: February 7, 2019

15 REED SMITH LLP

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17 By: /s/ Jesse L. Miller
18 Jesse L. Miller
19 Attorneys for Defendant
20 GREYHOUND LINES, INC.
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